BRIEF IN SUPPORT OF PETITION.

To the Honorable Supreme Court of the United States:

Petitioners respectfully submit to this Honorable Court the following brief in support of their petition for writ of certiorari.

The Opinion of the Court Below.

The final judgment of the Court below, against which this application complains, is reported in Advance Sheet No. 1 to Volume 140 F. (2d), at page 76 (R. 106).

Jurisdictional Statement.

It is believed that the questions involved are of general importance, concerning a proper interpretation of the Bankruptcy Law, and a conflict of jurisdiction between the State and the Federal Courts. It is respectfully submitted that jurisdiction of this case, which reposed in the State Court by such decisions as *Danciger* v. *Smith*, 276 U. S., 542, has been taken away by the decisions of the Courts below; which, therefore, are in conflict with application decisions of this Court.

Questions Involved.

1. A discharged bankrupt brought a suit in equity in a State Court to impress specific property with a trust in his favor and for damages for alleged breaches of trust. Defendants were not creditors but were adverse claimants. They first submitted to the jurisdiction of the State Court by answering therein. They thereafter procured the revocation of the bankrupt's discharge because he had failed to schedule the claims set up by him in the suit in the State Court. A trustee was then for the first time appointed, and duly moved to join in the suit in the State

Court; but was prevented by Federal injunction issued in an independent suit brought by those same adverse claimants under the Declaratory Judgments Act of Congress of June 4, 1934 (Title 28, section 400, U. S. Code). Did the District Court have any jurisdiction to entertain this novel and unprecedented procedure under the circumstances?

2. Can the adverse claimants merely by their own consent, without the concurrence of the trustee, confer jurisdiction on the Federal court under Title 11, par. 46 (b)?

3. Did the vesting in the trustee of the bankrupt estate upon his appointment prevent the bankrupt from suing in the State court prior to the trustee's appointment?

4. Does not the State court have exclusive jurisdiction of this matter?

5. Have the adverse claimants stated a case for relief to them under the Declaratory Judgments Act (Title 28, section 400)?

Statement.

For a narration of the facts of these proceedings we respectfully refer the Court to the decision in this case dated January 10, 1944, and to the petition upon which this application is made.

There are a few points of fact that we desire to repeat here from the petition, to wit:

(1) No trustee was appointed prior to the discharge in bankruptcy, and the reopening thereof (R. 3).

(2) The action in the State court was commenced May 28, 1936, in the interim between the discharge in bankruptcy and the re-opening of the bankruptcy proceedings (R. 3).

(3) The McLendons fully answered to the merits in the State court.

(4) On December 1, 1937, the trustee petitioned the court for authority to engage counsel. This resulted in the order of his Honor Judge Myers dated December 17, 1937. The order of December 17th concludes with these words:

> "All the said Counsel to represent the said Trustee and to pursue the cause of action as set out in the complaint in the pending cause, either in the Court of Common Pleas for the County of Lee or in such other jurisdiction as may be advised as the Trustee shall direct" (R. 42).

Pursuant to this authority the Trustee endeavored to join in the action in the State court as a co-plaintiff.

We are in entire accord with the honorable Circuit Court of Appeals in the following statement, to wit:

> "On the question of jurisdiction, it is perfectly clear that, since the suit was to recover or impress a trust on property not in the possession of the bankrupt and adversely claimed by others, the bankruptcy court would have had no jurisdiction of the controversy if the McLendons had objected. In such case suit must be brought in the court that would have had jurisdiction in the absence of bankruptcy. 11 U. S. C. A. 46. It is well settled, however, that the bankruptcy court does have jurisdiction of such a controversy if the parties consent."

But we respectfully dissent from the court's view that the Trustee consented here. While it is true that the trustee in bankruptcy was an officer of the Court, and could not act contrary to the Court's direction, we can not believe that he was such an automaton as the Circuit Court of Appeals makes him. Under Title 11, Section 72 of the U. S. Code, a trustee in bankruptcy should in the first instance be elected by the creditors. The Court's power to appoint is only secondary; which makes it apparent that the trustee has at least some discretion independently

of the Court, and his acts are only subject to the Court's review. We cannot conceive that the Court must think for him.

This is especially true in this case, where the Court had previously, by its order of December 17, 1937, given the trustee authority

> "to pursue the cause of action as set out in the complaint in the pending cause, *either in the Court of Common Pleas for the County of Lee, or in such other jurisdiction as may be advised and as the Trustee shall direct.*" (Record, page 42).

Surely, the Court was thus precluded by its own order from directing to the contrary as it did in the Order of September 1, 1938.

Referring to the trustee's control by the Court, it is said:

> "But in the ordinary matters of administration he must act upon his own judgment, and he is not entitled to resort to the Court for instructions so as to avoid the responsibility of deciding upon the course to be pursued." (7 Corpus Juris, page 229.)

We believe that the Circuit Court of Appeals' proposition, that when the McLendons (not creditors, but debtors) petitioned the Bankruptcy Court to adjudicate the matter, and the court ordered this to be done, the consent of the trustee followed the order, is not sustained by the authorities cited by the Circuit Court of Appeals. The case of *In re Hadden Rodee Co.* 135 F. 886 is clearly distinguished in the case of *In re Vadner,* 259 F. 614, 634, holding to the contrary.

In Re: Vadner, 259 F. 614 is somewhat converse in its setting to the facts of the present situation, which would be like those of the *Vadner* case if it were R. W. McLendon, instead of Dr. Lane who were the bankrupt, and if it were McLendon's trustee who intervened in the State Court. But

the reasoning of the case very clearly shows the unsoundness of permitting the opposite parties on their mere motion or consent to thrust the case into Federal jurisdiction without consent of the trustee, solely because of the existence of a bankruptcy proceeding.

Three suits by Agnes R. Vadner against Charles S. Vadner and others, in which W. E. Pruitt, trustee of the estate of Charles S. Vadner, bankrupt, intervened, were brought in a State Court of Utah, and after consolidation were removed to the District Court of the United States for the District of Nevada, where bankruptcy proceedings against Charles S. Vadner were pending. Cases remanded. The court said in part:

> "Defendants place their main reliance on the fact that Vadner had been adjudged a bankrupt in this Court. If this circumstance is sufficient to require the divorce case, the law case, and the equity suit to be removed to the federal court for Nevada, and each issue, notwithstanding the judgment, to be tried de novo, it is apparent that the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544) affords a method of bringing into the federal tribunals civil suits without limit. Any person, except a municipal, railroad, insurance, or banking corporation, is entitled to the benefits of the Bankruptcy Act as a voluntary bankrupt. If such a person owes debts, however small, he may file a petition. It is not necessary for him to allege or prove insolvency; and, furthermore, his petition cannot be opposed by his creditors. Can such a person, finding himself involved in litigation, in which the decision has been, or is likely to be, adverse, by filing a voluntary petition in bankruptcy, cause the suits against him to be removed to a federal court and there tried anew? If under such circumstances the present litigation is removable from Utah state court to the United States District Court for Nevada, what is to prevent a person who is sued in a superior court of California from residing for the greater part of the six months in Maine, and then and

there filing a petition in voluntary bankruptcy, and thus conferring on the United States District Court for Maine exclusive jurisdiction over the controversy pending in the California State Court? The possible uses which might thus be made of the Bankruptcy Act are startling to contemplate.

"Defendants argue that the trustee cannot ask the removal of these cases to the State Court, and cite in support of that proposition the decision of Judge Seaman *In re,* Hadden Rodee Co. (D. C.), 135 Fed. 886.

"The trustee is not seeking to remove cases from this Court to the Utah state court; his position is that cases pending in that court, neither removable nor properly removed here, should be remanded.

"To say that a cause in which the trustee is a party cannot be remanded after removed to this court because the trustee cannot ask it, is equivalent to saying that the removability of such causes, and the jurisdiction of this Court over them, is controlled by the parties opposed to the trustee.

"*In the Hadden Rodee Co. case supra*, there was no suit, at law or in equity, pending anywhere. The Merchants' & Miners' Bank filed a petition with the referee in bankruptcy, claiming certain shares of mining stock, which the custodian refused to surrender without the consent of the trustee." *In Re: Vadner,* 259 F., 614, 618, 633, 634. (Italics added.)

The trustee here takes the same position as in that case, that the cause of action pending in the State Court was properly there under the cases of *Danciger* v. *Smith,* 276 U. S. 542, 72 L. ed. 691, 48 S. Ct. 344; *Johnson* v. *Collier,* 222 U. S. 538, 56 L. ed. 306, 32 S. Ct. 104, and other authorities cited, and that neither this cause of action, nor any suit for a declaratory judgment necessarily determinative of it, should be brought into the bankruptcy Court; but should be sent back to the State Court, if brought to the bankruptcy Court.

The further proposition of the Circuit Court of Appeals that when the original defendants, the McLendons, by their petition submitted themselves to the jurisdiction of the bankruptcy Court and ask that the rights of the trustee as against themselves be there determined, there can be no question as to the Court's power to make the determination, puts an astonishing construction upon the statute.

This statute, Title 11, Section 46 (b), U. S. Code, as it stood before its amendment by the Act of June 22, 1938 ("Chandler Act," which has no application because this suit was commenced before the passage of the latter) provides that

> "Suits by the trustee shall be brought or prosecuted only in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendants," etc.

In other words, without a "*consent*" within the meaning of the statute, this action had to be brought in the Court of Common Pleas for Lee County, South Carolina; because both the plaintiff Lane and the defendants McLendon reside there.

It is obvious that it takes two parties to make a "*consent.*"

In 12 Corpus Juris, commencing on page 515, may be found the definition of the word "Consent." It is there variously defined as an accord of minds, acquiescence, an agreement in opinion or sentiment, an agreement of the mind to what is proposed or stated by another, an agreement of one with another to the doing of something or leaving something undone, an agreement to something proposed, voluntary allowance or acceptance of what is done or proposed to be done by another, assent to some proposi-

tion submitted implying concurrence, and so on, all of which definitions show the necessity of two or more parties to the agreement.

"Consent" is defined as a voluntary allowance or acceptance of what is done, or proposed to be done, by another; synonymous terms being to "accede, acquiesce, yield, comply, agree, concur." *Citizens' State Bank of Sabetha* v. *Burner,* 291 P. 739, 741, 131 Kan. 286; *Plummer* v. *Commonwealth,* 64 Ky. (1 Bush) 76, 78. See also *Richardson* v. *Richardson,* 114 N. Y. Supp. 912, 916; *Wilkinson* v. *Misner,* 138 S. W. 931, 935, 158 Mo. App. 551; *Clark* v. *North,* 111 N. W. 681, 682, 683, 131 Wis. 599, 11 L. R. A. (N. S.) 764, 11 Ann. Cas., 1080 (citing Century Dict.; 2 Words and Phrases, pages 1437, 1438).

We respectfully submit that there is reversible error in the view of the honorable Circuit Court of Appeals that there is no merit in the contention that the State Court first acquired jurisdiction over the *res.* The Courts admit that pending the appointment of a trustee, the bankrupt may sue for the protection of assets belonging to the estate. This upholds the right of the Petitioner Joseph Benjamin Lane to have brough suit, as he did, against the McLendons in the Court of Common Pleas for Lee County, South Sarolina, there then being no trustee appointed. That was in line with the decisions controlling in this case, of *Johnson* v. *Collier,* 222 U. S. 538, 32 S. Ct. 104, 56 L. ed. 306; and *Danciger* v. *Smith,* 276 U. S. 542, 48 S. Ct. 344, 72 L. ed. 691. We believe these cases are conclusive of the matter now at bar; for, as the present action was properly commenced in the State Court, and the trustee did not elect to move it out of that Court, then undoubtedly the State Court acquired jurisdiction, and the Federal Court had no power to take it away over the opposition of the trustee.

> "Where two courts have concurrent jurisdiction a party may elect to bring his action in either, and when

his election is made it is binding upon him, and the court in which the action is brought has exclusive jurisdiction of that particular case." 15 C. J. 1131, par. 579.

"But where the court possesses jurisdiction of the general class of cases to which a particular suit belongs, it will acquire jurisdiction over the subject matter on the parties' voluntarily coming before the court, the one demanding relief and the other defending." 4 C. J. 1349, par. 40.

The McLendons answered in the state Court.

It is a poor rule that does not work both ways. The federal Courts are very jealous of maintaining their jurisdiction in cases where the objecting party submits himself to that forum; as witness the long number of cases cited in the footnotes to Title 11, Section 46 (b) U. S. C. A., showing various acts and pleadings by adverse claimants in bankruptcy held to have been consents to federal jurisdiction.

In the matter of *Albert N. Moore*, 209 U. S. 490, 52 L. Ed. 904, a plaintiff was held to have accepted the jurisdiction of a Federal Court over a suit removed from a State Court on a defendant's petition, where, after the removal, plaintiff, instead of moving to remand, filed an amended petition in the Federal Court and signed stipulations therein. This was a case in which even the rights of a minor were involved, and yet he was held bound by these acts of his next friend to have submitted to the Federal jurisdiction. Why should not the same rule apply in regard to the State Court?

We are in entire harmony with the District Court's proposition that

"Upon the adjudication of bankruptcy, the title to all of the property of Joseph Benjamin Lane, wherever situated, vested in the Trustee as of the date of the filing of the petition in bankruptcy."

Still it was never contemplated by the bankrupt law that the valuable rights claimed by Dr. Lane should go derelict because of the absence of the functions of a trustee until one was appointed after the reopening of the bankruptcy proceeding.

The legal status of a bankrupt as a litigant is well expressed in the syllabi of the case of *Eggleston* v. *Barnett*, 220 Ala. 395, 125 So. 637, which cites United States decisions in support of its conclusions. These syllabi are as follows:

> "Title of bankrupt is not divested by adjudication of bankruptcy, but his holding is in nature of trustee ad interim, and title remains in him until there is someone in which it may vest, and on appointment of trustee title vests in latter and relates back to adjudication.
> "Pending appointment of a bankruptcy trustee, bankrupt has such title as will support an action.
> "Bankruptcy trustee, when appointed, may intervene by direction of bankrupt court and prosecute action previously commenced by bankrupt for benefit of estate."

The case of *Danciger* v. *Smith*, 276 U. S., 542, 72 L. Ed. 691, 48 S. Ct., 344, is on all fours with the issues now presented to this Court, except that the present case, as will be hereinafter shown, is somewhat stronger in its setting for supporting the right of the bankrupt to have instituted his action against these adverse claimants. In *Dancinger* v. *Smith, supra,* suit was brought by Smith in the Texas Court to recover brokerage commissions claimed to be due him from Danciger and an oil company. The present case is, as above stated, the stronger one for present purposes; because Lane did not commence his suit until after his discharge in bankruptcy, whereas Smith's case was pending

in the Texas State Court even before he filed the bankruptcy proceedings; and, although he had full knowledge of its then pendency, *he did not mention this claim in the schedules, and stated that he had no assets.* He was thereupon adjudicated a bankrupt. *No trustee was appointed for his estate, and he was granted a discharge;* all of which was precisely as has occurred in the present case. At the trial of the suit in the Texas State Court, the defendants, in addition to their defenses on the merits, relied upon the defense, appropriately pleaded, that by reason of the proceeding in bankruptcy, Smith had ceased to be the owner of the cause of action, and was not entitled to prosecute the suit, which is exactly the claim made by the petitioners McLendon in the instant case. That contention, however, was overruled, and Smith recovered judgment, which was affirmed by the Texas Court of Civil Appeals, from whence the case came on a writ of certiorari to the United States Supreme Court, and that tribunal affirmed the judgment below.

Appellees' counsel claimed below that the failure to appoint a trustee in the first instance was due to the fraud of the bankrupt, for which he would not be permitted to obtain any advantage. It can just as well be said that the failure to appoint a trustee in the *Dancinger* case, *supra*, was a similar fraud, and yet the United States Supreme Court took no such view as that advanced by counsel, and distinctly held that the bankrupt, Smith, could take advantage of the fact that no trustee was appointed, and thereby maintain his action in the Texas State Court.

The case of *First National Bank* v. *Lasater*, 196 U. S. 115, 49 L. Ed. 498, referred to by the Circuit Court of Appeals by way of comparison, does not in any way lessen the effect of *Danciger* v. *Smith*, *supra*, where there

also was a failure by the bankrupt to list the claim involved among his assets in the Bankrupt Court. The *Danciger* case was a much later decision, which the Court itself well distinguished from the *Lasater* case. There was a trustee appointed in the *Lasater* case; there was none in the *Danciger* case and none here. A total outsider, like the bank in the *Lanaster* case, sued for usury in the payment of a note, which the main decision in the case, upon which it really turned, held not recoverable because the note was paid with another note instead of cash, had a right, of course, to take the position that since the trustee had never taken any action in respect to it, the bankrupt who had failed to report it to him, could not; since the right of action if any was vested in the trustee, whether he knew about it or not. But how does that affect a situation in which there was no trustee in which it could vest, or who could have acted?

The *Lasater* case, moreover, is explained in page 282 of Volume 19 of "Rose's Notes on U. S. Reports, Revised Edition and on page 123 of Supplement No. 4 to the same, which authorities show that the statement in the syllabus of the case, to the effect that title cannot be asserted by the bankrupt upon the termination of the bankruptcy proceedings, where he returned no assets to the trustee, means nothing more than that the 'bankrupt cannot after discharge retain for himself such property if it prove valuable'." Of course not. We do not contend that Lane can retain it for himself without accounting for it to Mr. Hyman, the trustee.

The U. S. Supreme Court, in *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 231, 67 L. Ed. 226, 231, 43 Sup. Ct. Rep. 79, quotes with approval, from *Baltimore & O. R. Co.* v. *Wabash R. Co.*, 57 C. C. A. 322, 119 Fed. 680, to the effect that when a State Court and a Federal Court

may each take jurisdiction, the tribunal which jurisdiction first attaches (the State Court, in this instance) holds it to the exclusion of the other; that the rule is not only one of comity, but it is a principle of right and law, and therefore of necessity, leaving nothing to discretion; and that this suit applies to suits to administer trusts.

As Judge Sibley of the Northern District of Georgia puts it: "the Court that is first in time is first in right." *In Re: Gallimore*, 16 F. (2d) 801.

The effort to sustain Judge Myers' statement (pg. 34 of record) that this proceeding was brought under the authority of the Declaratory Judgment Act of Congress of June 4, 1934 (48 Stat. at L. 955, Chapter 512; Judicial Code, Section 274 D; Title 28, U. S. C. A. Section 400) seems to have been long since abandoned by the Appellees, as it was not urged in the Circuit Court of Appeals, and was not referred to by that Court. It serves, however, to show the amazing stretches of the procedure followed in this case. The defendants, sued in a State Court of perfectly competent jurisdiction, have been allowed to make of themselves plaintiffs in a Federal Court, and to stop by injunction the proceedings in the former Court. Debtors, adverse claimants and defendants have been permitted to select the forum and control the litigation!

We are unable to argue the merits here, because of Petitioners' inability to finance the presentation of the whole record to this Court. But we will say that all the essential allegations of the plaintiff's complaint in the State Court have been supported with evidence; and yet the defendants have been acquitted of all the charges there laid on grounds which to us appear to be sheerly technical, and without any of the McLendons being even required to make a statement in explanation of what they have done.

All of their tactics have been directed to evading any answer to the charges; and to keep out of a Court where they may have to face a jury of their fellow citizens.

Respectfully submitted,

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